



BROADBAND OFFICE

2900 Telestar Court, Falls Church, VA 22042
703.641.6000 (tel)
703.641.6095 (fax)

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

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Dear Ms. Salas:

BroadBand Office Communications, Inc. hereby submits one original and four copies of the comments in **WT Docket No. 99-217**, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*. Please date-stamp and return a copy of this cover letter to the undersigned. Thank you.

Sincerely,

BROADBAND OFFICE COMMUNICATIONS, INC.

Kathleen Q. Abernathy
Vice President, Public Policy

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Promotion of Competitive Networks in Local)	WT Docket No. 99-217
Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking to)	
Amend Section 1.4000 of the Commission's Rules)	
to Preempt Restrictions on Subscriber Premises)	
Reception or Transmission Antennas Designed to)	
Provide Fixed Wireless Services)	

COMMENTS OF BROADBAND OFFICE COMMUNICATIONS, INC.

Rachelle B. Chong, Esq.
Kathleen Q. Abernathy, Esq.
Aimee M. Cook, Esq.
951 Mariner's Island Blvd.
Suite 700
San Mateo, CA 94404
(650) 356-3200

Its Attorneys

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SUMMARY

BroadBand Office Communications, Inc. (“BBOC”) submits these Comments in response to the Commission’s proposed adoption of new rules concerning access to equipment space located in multiple tenant environments (“MTEs”). BBOC respectfully requests that the Commission reject the proposed adoption of new rules directed toward carriers offering services to tenants located in MTEs. Such rules are not necessary, as competition in the market for in-building services is flourishing.

The Commission proposes to prohibit carriers from providing service to MTEs whose owners unreasonably discriminate in providing carriers with building access. Although well-intentioned, this rule is not capable of being implemented and is therefore not a reasonable exercise of the Commission’s authority. First, it is not possible to articulate an unambiguous standard for “unreasonable” discrimination. Because the circumstances under which building access is granted and the factors considered in making building access decisions vary significantly, it is not possible to establish a consistent standard for “unreasonable” discrimination. Rather, building owners’ access decisions must be judged on an ad hoc basis. A “first-come, first-served” mandatory access standard is equally unworkable, as it creates incentives for carriers to direct resources to locking up building space at the expense of innovation and improvement of service quality.

Second, in order to comply with a rule against entering into access arrangements resulting from a building owner’s “unreasonable” discrimination, a carrier seeking to enter into an access agreement with a building owner would be required to review information such as the building owner’s internal building access policies and the

proposed terms and conditions offered by competing carriers in order to judge for itself whether the building owner's decision constituted "unreasonable" discrimination. Only in extremely rare instances, however, do carriers have access to this type of information. Moreover, most carriers do not have the real estate expertise necessary to second-guess the building owner's decision concerning which service provider would be the best overall choice for a particular property. Because carriers have no practical ability to implement the proposed rule, BBOC urges the Commission not to adopt it.

In response to the Commission's query regarding whether and to what extent it should regulate preferential building owner/LEC relationships, particularly those involving equity or revenue sharing relationships, BBOC notes that agreements containing preferential terms and the existence of equity or revenue sharing relationships are an indication of healthy competition. Such arrangements reflect appropriate competitive advantages that result from offering a superior level of service and committing to more onerous contractual obligations. The ongoing development of competition requires that the Commission protect carriers' ability to enter into such agreements.

Finally, BBOC requests that the Commission refrain from broadening the definition of "rights-of-way" for purposes of Section 224 of the Communications Act to include the entire building in the event a carrier has the right to install facilities anywhere in the MTE. Such a broadening of the definition of "right-of-way" would contravene the intent of Section 224 and would likely result in a disinclination on the part of building owners to enter into building access agreement, thereby threatening the benefits to competition which flow from such agreements.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Promotion of Competitive Networks in Local Telecommunications Markets)	WT Docket No. 99-217
)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services)	

COMMENTS OF BROADBAND OFFICE COMMUNICATIONS, INC.

BroadBand Office Communications, Inc. ("BBOC"), by and through its attorneys, submits these Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") issued in the above-referenced proceeding. As discussed below, BBOC urges the Commission to reject the proposed adoption of new rules directed toward carriers offering services to tenants located in multiple tenant environments ("MTEs").

I. INTRODUCTION

BBOC is a provider of integrated telecommunications, networking, and application services. BBOC serves customers located primarily in commercial office buildings in 38 markets nationwide. The parent company of BBOC, BroadBand Office, Inc. ("BBO"), was launched in May 1999 by the venture capital firm of Kleiner Perkins Caufield & Byers and eight large commercial real estate owners. Its formation was in response to the desire by MTE building owners ("building owners") to ensure the availability of high quality advanced telecommunications and data services to their

building tenants, particularly underserved small and medium-sized businesses. By pre-wiring commercial office buildings in order to offer state-of-the-art communications and networking capabilities, BBO provides its customers with the ability to simply plug into a BBO wall jack and immediately access a full range of integrated network services (local/long distance voice service, high speed Internet access, managed firewall, virtual private network services), computing services (desktop hardware) and hosted applications services. The cutting-edge technologies offered by BBO in particular allow small and medium-sized businesses to compete with large businesses by leveraging the scale and scope economies that result when costs are shared between tenants located within the building.

In order to create “smart buildings” that offer such advanced capabilities, dozens of companies with significant commercial office property holdings (“real estate partners”)¹ have entered into building access agreements with BBO. Under these agreements, in exchange for an equity interest in the company and/or a percentage of revenues, BBO is granted access to buildings in order to pre-wire them for BBO’s integrated network, applications and computing services. To the extent some BBO real estate partners have received an equity interest in the company, it is important to note that each such investment in no way represents a controlling interest in BBO, nor is BBO a subsidiary of any of its real estate partners. Rather, BBO enjoys a cordial, but arms-length, relationship with all of its real estate partners. It is also important to note that

¹Over 80 prominent real estate companies have now partnered with BBO. BBO real estate partners include: A.H. Warner Center Properties, Limited Liability Company, Carlyle Broadband Holdings, L.L.C., CarrAmerica Realty Corporation, Crescent Real Estate Equities Limited Partnership, Duke-Weeks Realty Limited Partnership, EOP Operating Limited Partnership, Hamilton Partners Office Management, Inc., Highwoods Realty Limited Partnership, Hines Broadband Holding Limited Partnership, Mack-Cali Realty, L.P., Olmstead Telecom, L.L.C., TRC Telecommunications, L.L.C., S. L. Green Operating Partnership, L.P., Spieker Properties, L.P., USAA Real Estate Company, and Wien & Malkin LLP.

BBO's building access agreements with its real estate partners are non-exclusive and do not limit its partners' ability to negotiate and enter into contracts with other carriers. In fact, most of BBO's real estate partners have entered into similar access arrangements with other telecommunications providers such as Teligent, Inc., Winstar Communications, Inc., Allied Riser Communications Corp., Cypress Communications, Inc., and Urban Media.²

II. ANALYSIS

In passing the Telecommunications Act of 1996 (the "1996 Act"),³ Congress sought to create a "national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . ."⁴ Congress explicitly stated its intent that such policy framework be both "pro-competitive [and] de-regulatory."⁵ Using competition and deregulation as its twin guideposts, this Commission has been implementing the 1996 Act for almost five years, with the introduction of competition in the local telephone market as one of its chief objectives. In fact, BBO is a company borne out of the 1996 Act's vision of a fully competitive telephone marketplace bringing new choices, lower prices and innovation to consumers. Given the Commission's intense focus in recent years on deregulation and the introduction of local telephone competition, it would be ironic for the FCC to introduce new regulations concerning provision of telecommunications services to MTE tenants, an area in which competition is thriving.

² Of course, in every building BBO enters, the incumbent local telephone company ("ILEC") is BBO's primary competitor.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of 15 and 47 U.S.C.).

⁴ S.Conf.Rep.No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (1996 Conference Report).

⁵ *Id.*

A. **Further Regulation of Building Access Is Unnecessary and Would be Anti-Competitive**

In its First Report and Order in the instant proceeding (the “Building Access Order”), the Commission established a rule prohibiting telecommunications carriers from entering into exclusivity agreements – *i.e.*, agreements which prevent building owners from granting building access to other telecommunications service providers.⁶ The Commission concluded that such exclusivity agreements posed a direct threat to competition, and that the threat could be effectively addressed by adoption of this bright-line rule.⁷ In light of Congress’ emphasis on deregulation, however, imposition of additional building access regulations beyond this rule cannot be justified where no market failure has occurred. The evidence offered by commenting parties such as Winstar Communications, Inc. and Teligent, Inc. to establish the existence of a failure in the market for in-building communications services is at best anecdotal, and confirms not that the market is in a state of failure, but rather that it is in a state of transition.⁸

Since the enactment of the 1996 Act, building owners have faced a sea change in the manner in which telecommunications and data services are provided to their tenants, and in the corresponding demands placed upon them to accommodate the space needs of carriers providing such sought after services. Formerly accustomed to dealing primarily with incumbent local exchange carriers (“ILECs”), with the advent of competition, building owners began to receive demands for building access from unfamiliar new market entrants such as competitive local exchange carriers (“CLECs”) and fixed

⁶ In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, *First Report and Order and Notice of Proposed Rulemaking*, WT Docket No. 99-217, ¶ 27 (rel. October 25, 2000).

⁷ *Id.*

⁸ *See*, Comments of Winstar Communications, Inc. at 16-18; Comments of Teligent, Inc. at 9-10.

wireless carriers. While some building owners may have demonstrated some initial resistance to granting access to such CLECs or fixed wireless providers, building owners are now realizing the benefits of offering tenants access to building-wide state-of-the-art communications and IT services.⁹

The ability to offer tenants immediate access to advanced telecommunications services has become a competitive factor in the already highly competitive market for leased commercial office space.¹⁰ In the interest of cultivating tenant loyalty, building owners welcome potential providers of building-wide communications services that will appeal to their tenants – *i.e.*, providers that offer high quality services at competitive prices. This forces carriers to compete on the basis of appropriate market drivers such as price, quality of service and breadth of service offerings. The increase in tenant satisfaction resulting from ready access to advanced communications services in turn encourages other property owners to seek out similar arrangements, thus reinforcing and promoting competition.

Because it is in their best interest to ensure tenant access to advanced communications services, building owners have demonstrated an increased willingness to work cooperatively with service providers in order to facilitate building access on reasonable terms. One BBO real estate partner, for example, currently has access agreements with both BBO and a large wireless carrier, as well as with various carriers specifically requested by tenants and the ILEC in the regions in which it is located.¹¹ In addition, as the Commission noted in the Building Access Order, in recent months, the

⁹ Joint Comments of the Real Access Alliance at 5-9; Therese Fitzgerald, *It's Showtime*, Commercial Property News, www.cpnrenet.com/findit/2000/oct01/showtime.html, October 1, 2000.

¹⁰ Comments of Equity Office Properties Trust at 2, 4.

¹¹ *It's Showtime*, Commercial Property News, pp. 8-10.

real estate industry has voluntarily established guidelines for creating model building access agreements and for establishing best practices concerning provision of building access to multiple carriers.¹²

In direct contrast to this trend of developing competition in MTEs, adoption of further building access regulation would severely undermine the current competitive environment. The rule proposed in the FNPRM, would prohibit carriers from entering into access agreements with building owners that engage in “unreasonable” discrimination in the granting of such access. Such a rule would cause confusion and uncertainty as building owners attempt to distinguish “reasonable” from “unreasonable” discrimination. The rule would inevitably result in complaint cases and would discourage both carriers and building owners from entering into access arrangements. Moreover, carriers do not have access to the information necessary to review building owners’ decisions in order to determine whether they are “reasonable” and therefore acceptable. Nor do the carriers have the expertise necessary to make such a determination. Thus, carriers have no practical ability to implement the rule proposed in the FNPRM.

Equally as problematic, adoption of the first-come, first-served mandatory access approach proposed by some commenting parties would result in a replication of the worst aspects of the now defunct monopoly environment.¹³ Established carriers would be motivated to “lock up” as much equipment space in building telephone closets as possible, regardless of whether they intended to use it to provide service. This “land rush” would result in other carriers being prevented from entering the market. Rather

¹² Building Access Order at ¶ 8.

¹³ See, e.g., Comments of Winstar Communications, Inc. at 23; Comments of Teligent, Inc. at 16.

than imposing additional regulation that would have the unintended effect of diminishing competition, the Commission should trust that market forces will continue to create an environment in which viable competitors will succeed based upon their ability to offer a high level of service at reasonable prices.

B. The Commission Should Not Use its Jurisdiction Over Telecommunications Carriers in Order to Indirectly Regulate the Actions of Building Owners

In the FNPRM, the Commission asks whether its statutory authority over telecommunications carriers allows it to prohibit such carriers from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE.¹⁴ Before reaching this issue, however, the Commission should consider the preliminary question of whether it is in fact even possible to establish a precise standard for “unreasonable” discrimination.

i. There Exists No Viable Standard for “Unreasonable” Discrimination

Any regulation prohibiting “unreasonable” discrimination must include a discernable standard for determining what actions constitute “unreasonable” discrimination. In the absence of such a standard, confusion and excessive litigation will ensue. As noted above, the Commission has already adopted a clearly-defined rule prohibiting exclusivity agreements between building owners and service providers. By contrast, the additional regulation proposed in the FNPRM is inherently vague and ambiguous. Because the circumstances under which building access is granted vary widely, the reasonableness of a decision by a building owner to grant building access to a

¹⁴ Building Access Order at ¶ 135.

particular carrier must be judged on an ad hoc basis according to individual facts of the situation. The inability to predict each and every potential building access scenario in order to craft a consistent standard for “unreasonable” discrimination makes development of such a standard a difficult, and ultimately futile, effort.

BBO believes that it is not possible to establish a standard to determine what is “*unreasonable*” discrimination. It is uncontroverted that equipment space in existing telephone closets within MTEs is limited, and that in many cases more CLECs seek access than can be accommodated.¹⁵ As a vice president of telecommunications for a large real estate company noted, “[t]he telephone rooms of America were not built for competition today . . . [n]o one thought you could make money from your telephone rooms.”¹⁶ Thus, building owners are forced to discriminate between carriers requesting access. Development of further building access regulation must therefore be predicated upon the notion that discrimination in providing access to equipment space is unavoidable. Given that equipment space is limited, a building owner should be permitted to choose between carriers based on reasonable bases for discrimination, such as quality of services, price, ability to serve all building within its portfolio, and the like. Properly framed, the issue to be determined in the instant proceeding is whether it is possible to identify and eliminate *unreasonable* bases of discrimination. BBO strongly believes that it is not possible to do so, and that such well-intentioned but impractical attempts to further regulate building access will hinder emerging competition and diminish benefits to consumers.

¹⁵ See, Joint Comments of the Real Access Alliance at 25-26.

¹⁶ *It's Showtime*, Commercial Property News, p. 8.

Basic marketing strategy requires that carriers differentiate themselves from their competitors in order to attract customers. As discussed above, building owners generally base their decisions concerning how to allocate scarce equipment space on a determination of what combination of factors will be most appealing to their particular tenant base.¹⁷ A building owner, for example, may grant building access to a carrier whose focus is high-bandwidth data services if the tenants in that building are engaged in enterprises such as financial services, high tech or law that require access to high-bandwidth facilities. Similarly, a building owner may grant building access to a carrier whose focus is voice services, rather than data services, if the main tenant runs a large call center. In addition, a building owner may consider such factors as a carrier's willingness to serve all building tenants, regardless of size, or to provide service level guarantees.¹⁸ Since the decision to grant building access to a particular carrier is based on an ad hoc weighing of several factors and the individual business judgment of the building owner, it is not possible to create a standard for reasonable discrimination that fits the multitude of building access scenarios. A decision that is deemed to be reasonable in one situation may be considered unreasonable in another.

Some commenting parties have suggested that the Commission impose what amounts to a "first-come-first-served" access requirement.¹⁹ This approach, however, is far more likely to hinder than to promote the development of competition. Rather than providing a clear incentive to carriers to innovate and offer a greater number of services at attractive prices, a first-come-first-served requirement would reward carriers who

¹⁷ Joint Comments of the Real Access Alliance at 14; *see also*, Steve Bergsman, *Demetree, Hornig Stress Tenant Need*, Commercial Property News, www.cpnrenet.com/archives/2000/jun16/demetree.html, June 16, 2000.

¹⁸ Comments of Equity Office Property Trust at 2-5.

¹⁹ Comments of Winstar Communications, Inc. at 23; Comments of Teligent, Inc. at 16.

divert resources away from such efforts in favor of a campaign to nail down a large footprint, and warehouse space to the detriment of other carriers. Rather than creating a level playing field, a first-come-first-served approach would allow those early-entrant carriers with a large building footprint to remain dominant simply by retaining and adding to their footprint. While such a “land-grab” approach would allow carriers to lock up a large footprint, it would likely deprive them of the resources necessary to serve tenants well by providing high-quality and innovative service offerings.

With no reasonable way to establish a discriminatory standard, virtually any decision by a building owner to grant building access could be called into question by a rejected carrier. The Commission would become entangled in an endless morass of complaints in which it would be required to conduct complicated examinations of the minutiae of specific building access negotiations. Such a review would require exploration into the individual thought processes of the building owners and analysis of complex real estate business factors, such as impact of proposed infrastructure improvements on property value, current and future tenant demographics, and consideration of zoning or use restrictions. The threat of litigation, and the inability to guard against it, would likely dissuade both carriers and building owners from entering into access agreements, and the positive competitive effects of such access agreements for tenant choice would be lost.

ii. Adoption of the Proposed Rule Would Constitute an Improper Exercise of Commission Jurisdiction

Although the Commission has the authority to regulate telecommunications carriers such as BBOC, the rule proposed in the FNPRM is not a necessary or reasonable exercise of the Commission’s statutory authority. In order to

ensure the benefits of a free marketplace, the Commission should continue down a deregulatory path. In the instant case, there exists no market failure and no practical means by which to implement the rule proposed in the FNPRM. Thus, further Commission intervention in dealings between carriers and building owners concerning building access is not a reasonable exercise of Commission jurisdiction.

In the FNPRM, the Commission cites its decision in the Benchmark proceeding to support the position that its involvement in building access negotiations is appropriate.²⁰ The Benchmark proceeding involved the international settlement rates paid by foreign and domestic carriers to each other for the termination of international calls.²¹ The Commission became involved in setting benchmark rates in order to address the problem of foreign carriers imposing settlement rates that adversely impacted the rates paid by U.S. consumers for communications services.²² In order to control the amount of the international settlement rates imposed on domestic carriers, the Commission established a requirement that domestic carriers could not pay any international settlement rate that exceeded the benchmark settlement rate established by the Commission (the “benchmark rule”).²³

International carriers challenged the Commission regulation, claiming that the benchmark rule was intended to regulate foreign carriers not subject to Commission jurisdiction.²⁴ In upholding the Commission’s imposition of the benchmark rule, the D.C. Circuit Court of Appeals accepted the Commission’s declaration that the rule was

²⁰ FNPRM at ¶ 137; *see, In the Matter of International Settlement Rates, Report and Order*, IB Docket No. 96-261, 12 FCC Rcd. 19806 (rel. Aug. 18, 1997) (“Benchmark proceeding”).

²¹ *In the Matter of International Settlement Rates* at ¶ 1.

²² *Id.* at ¶ 36.

²³ *Id.* at ¶ 39.

²⁴ *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1229 (D.C. Cir 1999).

intended to apply only to domestic carriers, noting that “we must sustain the Commission’s view as long as the Order reasonably represents an exercise of its statutory authority to regulate domestic carriers”²⁵ The court relied on the fact that the Commission could not threaten foreign carriers with enforcement actions or exercise any control over them, other than to contact responsible foreign government authorities in order to seek support in lowering rates.²⁶

The instant proceeding differs from the Benchmark proceeding in several material respects. First, in the Benchmark proceeding, the issue to be resolved was precisely defined as unreasonably high international settlement rates.²⁷ By contrast, the FNPRM vaguely defines the problem to be addressed as practices that “contribute to” an environment in which new entrants are unable to gain reasonable access to end-users. The predictable result of such an open-ended description is overly-broad regulation that will undermine Congress’ deregulatory goal and is therefore not a reasonable exercise of the Commission’s statutory authority. Second, in the Benchmark Case, there was clear indication of market failure.²⁸ The same is not true in the instant case – in fact, competition in the market for in-building services is flourishing. In general, BBO faces two to four competitors in its built-out buildings. Because no market failure exists, exercise of Commission statutory authority in this case is, again, not necessary or reasonable.

²⁵ *Id.*

²⁶ *Id.* at 1230.

²⁷ *See, In the Matter of International Settlement Rates* at ¶ 36; *Cable & Wireless P.L.C.* at 1227-1229.

²⁸ *See, In the Matter of International Settlement Rates* at ¶ 36-39; *Cable & Wireless P.L.C.* at 1227-1229.

Finally, domestic carriers' adherence to the benchmark rule did not require any action by the foreign carriers.²⁹ Domestic carriers' conclusions regarding the reasonableness of settlement rates was dependent upon information automatically provided as a part of the proposed transaction (*i.e.*, rate information). The rule contemplated in the FNPRM, however, would require carriers to demand and building owners to provide information that is rarely, if ever, provided in the context of building access negotiations. In order to comply with a rule prohibiting them from entering into arrangements that result from building owners' unreasonable discrimination, carriers would be required, each and every time they seek to enter into an access agreement with a building owner, to review all relevant information and judge for themselves whether the building owner's decision is reasonable or unreasonable discrimination. This obligation would dramatically affect the relative roles and responsibilities of carriers and building owners.

In order to determine whether a building owner's decision to grant building access is "reasonable" discrimination and therefore acceptable, carriers would need to be made privy to all internal policies of the building owner concerning building access, and also of the proposed terms and conditions offered by all other carriers competing for the same equipment space. Only by analyzing this information could a carrier begin to form a reasonable conclusion concerning whether the building owners' basis for differentiation between carriers is reasonable. It is BBO's experience, however, that most building owners are generally not willing to divulge the proposed terms and conditions offered by competing carriers. It is, in fact, often the case that building owners are prohibited from doing so by the terms of non-disclosure agreements entered into between building owners

²⁹ See, *Cable & Wireless P.L.C.* at 1230.

and such competing carriers. Similarly, building owners do not commonly advise carriers of their internal business policies, nor do they provide detailed explanations in order to justify particular business decisions. Plainly, it is neither fair nor realistic to impose upon carriers the responsibility for determining the reasonableness of the actions of building owners when such carriers have no practical ability to obtain the relevant information necessary to make such a determination.

Even assuming, *arguendo*, that carriers would have access to information necessary to determine the reasonableness of building owners' actions, it is illogical to require carriers to substitute the business judgment of building owners with their own. Because building owners are responsible to tenants, and in many cases to shareholders, for making a multitude of business decisions designed to provide the best possible service to their tenants and to increase the value of their buildings, they have developed the expertise necessary to do so. A building owner's decision concerning the grant of access to a service providers is based upon an analysis of various factors including the impact on property value of proposed capital improvements, current and projected tenant base, and real estate market research.³⁰ Communications service providers, in contrast, operate in a different environment and do not have the expertise necessary to second-guess the business decisions made by building owners. Moreover, requiring carriers to consider whether the grant of access to them will be of the *greatest* benefit to tenants, and thus a reasonable decision by the building owner, places the carrier in a conflict of interest. It is the carrier's role to offer services, and the building owner's role to determine which

³⁰ See, Joint Comments of the Real Access Alliance at 14; *Demetree, Hornig Stress Tenant Need*, Commercial Property News.

carrier's services will be most attractive to tenants. To require carriers to undertake both roles is both inappropriate and impractical.

Further, the logistical complications created by the proposed rule would significantly increase the complexity, and corresponding burden, of access agreement negotiations. The reality is that the MTE communications market is dynamic and fast-moving. Providers simply do not have the time or excess resources necessary to perform a wholesale review of each and every access proposed transaction, particularly where such review would likely involve a time-consuming process of eliciting crucial information from other parties.

The only means by which carriers could realistically ensure that building owners had not unreasonably discriminated would be to require building owners to represent and warrant in the access agreement executed by the parties that no unreasonable discrimination had occurred. In the absence of such a guarantee, carriers may be discouraged from entering into access agreements due to litigation risk. Such a requirement is itself problematic, however, as the lack of a defined "reasonableness" standard would mean that *every* decision to grant building access made by the building owner could result in litigation.

Because the definition of "reasonableness" is inherently subjective and subject to challenge, a building owner that represents and warrants that it did not unreasonably discriminate in granting building access to a particular carrier cannot be assured that its conclusion would be scrutinized according to the same standard it applied. Thus, the lack of a defined standard would allow *any* rejected carrier to initiate a proceeding against a building owner for the purpose of conducting a fishing expedition in order to disprove the

building owner's conclusion that it had discriminated reasonably under the circumstances. Taking into account the likelihood of litigation, most building owners would be unwilling to enter into any access agreements and competition would suffer as a result.

Moreover, requiring that access agreements include a representation and warranty of reasonableness by the building owner would indirectly impose *actual* regulation on the actions of such building owner. In order to avoid breaching such a representation and warranty, the building owners would be required to adhere to the Commission's nondiscrimination requirements. Since carriers have no independent ability to ensure the reasonableness of the building owner's actions, the ultimate intent of the proposed rule is plainly to control the actions of the building owners. This violates *Ambassador v. U.S.*,³¹ in which the U.S. Supreme Court made clear that regulation may not be enforced in order to exert jurisdiction over a party not otherwise subject to such jurisdiction.³¹

In *Ambassador*, a group of twenty-seven hotels challenged enforcement of an FCC decision permitting telephone companies to include in their tariffs a rule prohibiting hotels from imposing a service charge on guests for their use of guest room telephones to make long distance calls.³² In response to the hotels' refusal to cease imposition of the service charge, the FCC filed an enforcement action seeking to enjoin the hotels' violation of the rule. The hotels challenged the FCC's action, arguing that the rule was unreasonable and therefore unenforceable. In its analysis, the U.S. Supreme Court acknowledged the FCC's broad authority under the Communications Act to regulate matters affecting the provision of communications services, and its obligation to ensure

³¹ *Ambassador v. U.S.*, 325 U.S. 317, 323 (1945).

³² *Id.*

that the rules contained in telephone company tariffs are just and reasonable.

Importantly, the U.S. Supreme Court expressly stated that the rules contained in filed tariffs “may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business.”³³ The Court concluded that the FCC’s enforcement of the rule prohibiting service charges was designed solely to regulate use of the communications service by a subscriber, and was not an attempt to directly control the hotels’ conduct of its business.³⁴

Unlike in *Ambassador*, a rule requiring that building owners make a representation and warranty of reasonableness in granting of building access would clearly constitute regulation of the building owner’s conduct of its business.³⁵ It is plain that the Commission’s authority to regulate communications services does not permit it to authorize or impose regulation which purports to regulate a communications service, but which is ultimately intended to regulate building access decisions of building owners who are not subject to FCC jurisdiction.

C. Preferential Relationships Between Building Owners and Carriers Promote Competition

In the FNPRM, the Commission seeks comments concerning whether and to what extent the Commission should regulate preferential building owner/LEC relationships, and whether such preferential arrangements should be viewed differently when a equity or revenue sharing relationship exists between the building owner and preferred carrier. As explained below, agreements containing preferential or favorable terms, and the existence of equity or revenue sharing relationships, are in fact an indication that

³³ *Id.*

³⁴ *Id.* at 323-324.

³⁵ *Id.* at 323-324.

competition is developing in accordance with the goals of the 1996 Act. Accordingly, it is vitally important that the Commission stimulate the development of competition by protecting carriers' ability to craft access agreements responsive to the competitive environment.

Development of vigorous competition in the local phone market requires that competitors seek to distinguish themselves by offering a broad range of innovative services at favorable rates. The competitive success enjoyed by those competitors that distinguish themselves in this way promotes further innovation and improvement. The notion that the competitors who offer more to customers will succeed, while those who offer less will fail, forms the underpinning of the decision in the 1996 Act to allow competition in the local services market. Congress sought to create dynamic market-based competition, in which innovation by competitors would serve both to benefit consumers and to raise the level of expectation for other competitors.

Because incumbent local exchange carriers have enjoyed – and continue to enjoy -- significant competitive advantages over new market entrants, the Commission has played an active and important role in leveling the playing field between ILECs and CLECs. In considering the appropriate limits of its regulatory involvement, however, it is important that the Commission draw a distinction between unfair competitive advantages that result from prior monopolistic relationships, and appropriate competitive advantages that result from offering innovative and advanced services. Far from indicating a market failure necessitating Commission involvement, this latter form of competitive advantage based on market differentiation is proof that the 1996 Act has worked and has given birth to new competitors.

Building owners recognize that offering tenants immediate access to a full suite of high-quality services, including telecommunications, data, networking and e-commerce services, will enable them to attract and keep desirable tenants. Savvy building owners have sought out strategic partners, such as BBO and others, that appeal to tenants by offering faster provisioned, high quality, reliable service at reasonable prices. In order to incent such carriers to offer services in their buildings, the owners have in many instances entered into access agreements that contain favorable terms. It is important to note that access agreements containing these favorable terms generally impose correspondingly higher obligations on the carrier. For example, carriers are often required to make significant capital expenditures in order to satisfy certain in-building infrastructure installation requirements, and to commit to specific service level guarantees.³⁶ Thus, any benefits realized by carriers from such favorable arrangements are balanced by the significant performance and capital obligations imposed upon them. In the current non-exclusive, non-monopolistic environment, in which tenants are not forced to use a single in-building provider, building owners are motivated to grant favorable terms only to those carriers that they believe will attract tenants and provide a consistently high level of service.

As the Commission notes, favorable or preferential arrangements often occur in the context of an equity or revenue sharing relationship.³⁷ The logic of such a circumstance is plain; a building owner who is confident that a carrier will be successful in attracting tenant customers and accordingly, as described above, seeks to enter into an access agreement, will in most cases be willing to accept equity or a revenue-sharing

³⁶ For example, BBOC invests substantial sums of money in order to pre-wire each building for advanced communications and data services – *often without a single customer in the particular building*.

³⁷ FNPRM at ¶ 168.

opportunity as consideration for entering into such access agreement. For new entrants with limited resources, the ability to offer equity or a revenue-sharing opportunity as consideration is critically important. While more established carriers, such as ILECs or large inter-exchange carriers, have ample resources and may pursue a business strategy that does not involve the granting of equity or revenue sharing, smaller and less well-positioned carriers must use the alternate resources available to them. Allowing flexibility in the structuring of access arrangements is crucial to ensuring that new market entrants are able to compete against entrenched industry players. Accordingly, rather than requiring all carriers to pursue an identical business strategy, the Commission should ensure that competitive carriers remain free to pursue their individual business strategies and to use their available resources in a manner that encourages competition, innovation, and benefits to consumers. To proceed otherwise would deal a blow to new entrants and would dramatically reduce the amount of competition in the market for in-building services.

D. Section 224 Should Be Interpreted to Require Access Only to Defined Pathways Associated with Carriers' Transmission and Distribution Networks

Section 224(f)(1) of the Communications Act requires carriers to provide “nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”³⁸ In the Building Access Order, the Commission concluded that Section 224(f)(1) requires a carrier to grant access to in-building rights-of-way, and clarifies that such in-building rights-of-way include “defined pathways that are being used or have been specifically identified for use as part of a utility’s transmission and distribution

³⁸ 47 U.S.C. § 224(f)(1).

network.”³⁹ In the FNPRM, the Commission asks whether, in the event a carrier has the right to install facilities anywhere in an MTE, the Commission should broaden the definition of “rights-of-way” to include the entire building, rather than limiting it to the defined pathways used in the carrier’s transmission and distribution network.⁴⁰ As explained below, such a broadening of the definition of “rights-of way” would violate the plain language of Section 224 and would contravene the public interest.

In defining the term “utility” for purposes of statutory application, Section 224(a)(1) states that a “utility” is a “local exchange carrier . . . who owns or controls . . . rights-of-way *used, in whole or in part, for any wire communication.*”⁴¹ Thus, the focus of the statute is clearly on rights-of-way *actually used* to provide wire communication. The Commission’s conclusion in the Building Access Order that in-building rights-of-way are limited to defined pathways being used as part of a utility’s transmission and distribution network is directly in line with this interpretation. Thus, expanding the definition of “rights-of-way” to include areas of an MTE not actually used to provide wire communications would be an inappropriate broadening of the rights established in Section 224.

Moreover, an access agreement that grants a carrier the right to place facilities anywhere within an MTE is likely to include provisions designed to control the methods and procedures by which such facilities must be installed. Such provisions are necessary, for example, to ensure tenant safety and to preserve the integrity of the property.⁴² In the event a third-party carrier seeks to gain access to an unused portion of an MTE pursuant

³⁹ Building Access Order at ¶ 82.

⁴⁰ FNPRM at ¶ 170.

⁴¹ 47 U.S.C. § 224(a)(1).

⁴² See, Joint Comments of the Real Access Alliance at 61-69.

to Section 224, however, the public interest would be compromised to the extent such third-party carrier was not subject to the methods and procedures provisions set forth in the access agreement. However, because Section 224 contains no opt-in right, there exists no mechanism for requiring the third-party carrier to comply with the relevant provisions of the access agreement.

Equally as harmful to the public interest is the likelihood that under the Commission's proposed broadened definition of "rights-of-way," third-party carriers would seek to use Section 224 as a means to avoid direct negotiation of access rights with building owners, and that building owners would respond by refusing to enter into access agreements, even with those carriers willing to negotiate them. This outcome would significantly impair the ability of carriers like BBO to offer service to customers. Thus, the benefits to consumers represented by the entrance of innovative carriers like BBO into the market for in-building service would fail to materialize. Accordingly, the Commission should reject the proposed redefining of "rights-of-way" to include areas of an MTE other than defined pathways used as part of a utility's transmission and distribution network.

III. CONCLUSION

For the reasons set forth above, BBOC respectfully requests that the Commission reject the proposed adoption of a rule requiring carriers to ensure the reasonableness of building owners' decisions to grant building access, and that it refrain from imposing regulation relating to preferential terms contained in access agreements. Finally, BBOC requests that the Commission reject the proposed broadening of the definition of "rights-of-way" to include areas of an MTE other than defined pathways used as part of a utility's transmission and distribution network.

Respectfully submitted,

BROADBAND OFFICE COMMUNICATIONS, INC.

By: 

Rachelle B. Chong, Esq.
Kathleen Q. Abernathy, Esq.
Aimee M. Cook, Esq.
951 Mariner's Island Blvd.
Suite 700
San Mateo, CA 94404
(650) 356-3200

Its Attorneys

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